6-20-2018

ACE American Insurance Co v. Anthony Guerriero

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 17-2893

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ACE AMERICAN INSURANCE COMPANY

v.

ANTHONY GUERRIERO,
Appellant

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On Appeal from the United States District Court
for the District of New Jersey
(D.C. No. 2-17-cv-00820)
District Judge: Hon. Claire C. Cecchi

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Submitted Under Third Circuit LAR 34.1(a)
June 4, 2018

Before: AMBRO, JORDAN, and VANASKIE, Circuit Judges

(Filed: June 20, 2018)

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OPINION*

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JORDAN, Circuit Judge

Anthony Guerriero appeals the District Court's order granting ACE American Insurance Company's motion to compel arbitration of an employment dispute, denying

* This disposition is not an opinion of the full Court and, pursuant to I.O.P. 5.7, does not constitute binding precedent.

his motion to dismiss, and enjoining him from pursuing the same dispute in state court. We will affirm.

I. BACKGROUND[1]

In an August 2009 letter, ACE formally offered Guerriero employment as Vice President, Claims Field Operations, in the ACE Private Risk Services Organization. The letter said that ACE "provides many helpful programs and services for employees[,]" including "the ACE Employment Dispute Resolution Program[,]" the final step of which "includes mandatory and binding arbitration[.]" (App. at 56.) The letter said that a copy of the Employment Dispute Arbitration Policy was attached, and it went on to direct Guerriero to sign and return the letter to ACE acknowledging his acceptance. Guerriero did sign the letter, thus "agree[ing] to employment under [its] terms[.]" (App. at 45 ¶ 6, 57.)

According to ACE, on Guerriero's first day on the job and in keeping with its regular practice for bringing new employees on board, ACE again provided a copy of the Employee Dispute Arbitration Policy to Guerriero. The document consisted of three pages, the first two being the policy statement itself and the last page being a signature page with the heading "Arbitration Agreement[.]" (App. at 59.) When employees were given the document, they were supposed to sign the signature page and return the entire

[1] The facts recounted here are derived from extra-pleading materials because Guerriero raises a factual challenge to Article III standing. *S.R.P. ex rel. Abunabba v. United States*, 676 F.3d 329, 332 (3d Cir. 2012). Those materials include a certification filed on behalf of ACE, a declaration of Guerriero, a declaration of Guerriero's counsel, and a declaration of ACE's counsel.

three-page document to ACE's Human Resources Department. In addition, employees could access the Employee Dispute Arbitration Policy using the company's intranet site.

Despite those regular business practices, ACE's personnel file for Guerriero only contained the signature page, which was signed and dated by Guerriero on his first day of work. It provides:

> I agree that, in the event I have any employment related legal claims, I will submit them to final and binding neutral third-party arbitration, in accordance with the ACE Employment Dispute Arbitration Policy recited above, which is made a part of this agreement. I understand that this agreement means that I cannot bring an employment related claim in court and that I waive my right to a jury trial for such claims.

(App. at 59.) The two pages of the Employment Dispute Arbitration Policy preceding the signature page were missing from Guerriero's personnel file.[2] Guerriero declares that he never actually received the Employment Dispute Arbitration Policy. He further says that

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[2] In relevant part, those two pages provide:

> This policy covers all employment-related disagreements and problems that concern a right, privilege or interest recognized by applicable law. Such disputes include claims, demands disputes, controversies or actions under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1866, the Civil Rights Act of 1991, the Equal Pay Act, the Age Discrimination in Employment Act, the Employee Retirement Income Security Act of 1974, the Fair Labor Standards Act, the Rehabilitation Act of 1973, the Americans with Disabilities Act, the Family and Medical Leave Act, and any other federal, state or local statute, regulation, ordinance or common law doctrine, regarding unfair competition, employment discrimination, retaliation, whistle blowing, wage and hour matters, conditions of employment or termination of employment.

(App. at 48.) The Employment Dispute Arbitration Policy "also specifically covers state statutory whistleblower claims such as the New Jersey Conscientious Employee Protection Act[.]" (App. at 49.)

he was never informed about access to the Employment Dispute Arbitration Policy on ACE's intranet.

In June 2016, ACE terminated Guerriero's employment. Guerriero contends that he was fired for reporting to his superiors that ACE was destroying materials in violation of "Litigation Hold Notices[, which] ... were instructions not to destroy or delete records regarding certain matters[.]" (App. at 83 ¶ 15.) He retained counsel, who forwarded a draft complaint to ACE and invited discussion of issues regarding the termination.

Over the next several months, the parties' attorneys engaged in settlement negotiations. During those talks, ACE's counsel forwarded a copy of the one-page "Arbitration Agreement" signed by Guerriero, as well as the additional two-page policy, and emphasized that Guerriero was obligated to bring his dispute to arbitration. In emails sent in late 2016, Guerriero's counsel asked for "the full arbitration agreement," "any updates to that agreement," and "the original signature page." (App. at 104.) ACE's counsel responded that he was looking for that information.

After a few weeks without a response, Guerriero's counsel followed up at the end of January 2017 by emailing: "As a courtesy, I'm reaching out to you one last time before we move forward with filing our complaint." (App. at 103.) On February 6, 2017, the attorneys spoke on the phone. They recall that discussion differently. Guerriero's counsel says he never rejected arbitration and never acknowledged that an arbitration agreement had been signed by Guerriero, while ACE's counsel attests that Guerriero's counsel said Guerriero would not arbitrate his claims.

The day after that phone conversation, ACE filed a complaint in the District Court, along with a motion to compel arbitration pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16.[3] ACE stated that it had been "aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration[.]" (App. at 38 ¶ 21.) The next day, Guerriero filed a complaint in the Superior Court of New Jersey raising two counts, one of which was under New Jersey's Conscientious Employee Protection Act ("CEPA"), N.J. Stat. §§ 34:19-1 to -14. Guerriero then filed in the District Court a cross-motion to dismiss ACE's complaint and deny the motion to compel arbitration.

The District Court held oral argument on the then-pending motions. At that hearing, ACE stated its intent to seek an injunction to prevent Guerriero from pursuing his state court action, and the Court invited the parties to file letter briefs in support of or opposition to such an injunction. ACE later filed a letter brief, but Guerriero did not.

Ultimately, the District Court granted ACE's motion to compel arbitration, denied Guerriero's motion to dismiss, and enjoined Guerriero from proceeding in the state court action pending resolution of the arbitration proceedings. The Court reasoned, first, that ACE had Article III standing to bring its complaint because it had demonstrated by a preponderance of the evidence that Guerriero refused to arbitrate. Second, the Court determined that there was no genuine dispute that Guerriero had knowingly and

[3] ACE also initially sought an order enjoining Guerriero from filing his complaint in state court, but, as the District Court recognized, that request was quickly rendered moot the next day when Guerriero filed his complaint in state court.

voluntarily entered into a valid Arbitration Agreement with ACE. Last, the Court enjoined Guerriero from proceeding in state court, saying that the injunction was necessary to protect and effectuate its judgment and prevent re-litigation over whether to compel arbitration. Guerriero timely appealed.

II. DISCUSSION[4]

Guerriero now raises three issues. First, he argues that there was no Article III controversy for the District Court to address because there was insufficient evidence to conclude that he had refused to arbitrate. Second, he challenges the Court's determination that he entered into an enforceable arbitration agreement with ACE. Finally, he asks that, if we vacate the District Court's order compelling arbitration, we also vacate its order enjoining him from proceeding with his state court action. Neither of his first two arguments is persuasive, so we will affirm and need not address his third argument.

[4] The Federal Arbitration Act "gives federal courts the authority to compel arbitration, but does not in itself confer independent federal question jurisdiction." *PaineWebber Inc. v. Faragalli*, 61 F.3d 1063, 1066 (3d Cir. 1995). "[T]he district court must have an independent jurisdictional basis before it can entertain a petition to compel arbitration[.]" *Id.*

Here, the District Court had diversity-of-citizenship jurisdiction under 28 U.S.C. § 1332. As alleged in the complaint, ACE is incorporated in Pennsylvania and has its principal place of business in Philadelphia, Pennsylvania, and Guerriero is a citizen of New Jersey. And the amount in controversy was alleged to exceed $75,000. Because the District Court had an independent basis for jurisdiction, it had authority to "entertain a petition to compel arbitration[.]" *PaineWebber*, 61 F.3d at 1066. We have jurisdiction pursuant to 28 U.S.C. § 1291.

A. ACE Had Article III Standing Because Guerriero Refused To Arbitrate.

In saying that there was insufficient evidence to support the conclusion that he had rejected arbitration, Guerriero challenges both the District Court's reliance on certain facts and its conclusion that he would not arbitrate. ACE responds that it showed by a preponderance of the evidence that Guerriero refused to arbitrate.

We exercise plenary review over jurisdictional matters but "review the Court's findings of fact, including findings related to jurisdiction, only for clear error." *Davis v. Wells Fargo*, 824 F.3d 333, 346 (3d Cir. 2016). Under clear error review, we "must accept the trial court's findings unless [we are] left with the definite and firm conviction that a mistake has been committed." *Johnson v. SmithKline Beecham Corp.*, 724 F.3d 337, 345 (3d Cir. 2013) (internal quotation marks and citation omitted). When there are disputes over jurisdictional facts, "the trial court is free to weigh the evidence[,]" *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977), and determine the facts by a preponderance of the evidence, *Frederico v. Home Depot*, 507 F.3d 188, 194 (3d Cir. 2007) (citing *McNutt v. Gen. Motors Acceptance Corp. of Ind.*, 298 U.S. 178, 189 (1936)). "Once a factual challenge has been raised, the plaintiff ... has the burden of proof to establish ... jurisdiction by a preponderance of the evidence." *GBForefront, L.P. v. Forefront Mgmt. Grp., LLC*, 888 F.3d 29, 35 (3d Cir. 2018). Because Guerriero argues that he did not actually refuse to arbitrate before ACE filed its complaint, we are faced with a factual challenge to ACE's standing to sue under Article III of the Constitution.

Pursuant to § 4 of the FAA,[5] a party may petition a district court for an order compelling arbitration when the other party to a valid arbitration agreement refuses to arbitrate. 9 U.S.C. § 4. Under that statute, a party is "aggrieved" when "an adverse party has refused to arbitrate[.]" *PaineWebber Inc. v. Faragalli*, 61 F.3d 1063, 1067 (3d Cir. 1995). But if a complaint to compel arbitration is filed before an adverse party has refused to arbitrate, "it is doubtful that [such] a petition ... would present an Article III court with a justiciable case or controversy[.]" *Id.*

Our review of the record reveals that the District Court's factual findings were not clearly erroneous. The Court relied on facts that were supported by declarations and certifications in the record, which it was free to credit. Based on those facts, the conclusion that Guerriero had refused to arbitrate was fairly reached. First, Guerriero demonstrated that he had no intention of arbitrating when he presented ACE with a draft complaint. Second, Guerriero's counsel communicated Guerriero's intention not to arbitrate when he sent an email to ACE saying, "[a]s a courtesy, I'm reaching out to you one last time before we move forward with filing our complaint." (App. at 103.) Third, ACE's counsel filed a declaration stating that, in a February 6 phone conversation,

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[5] In relevant part, the statute provides:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court ... for an order directing that such arbitration proceed in the manner provided for in such agreement.

9 U.S.C. § 4.

Guerriero's counsel clearly communicated Guerriero's refusal to arbitrate. Although Guerriero points out that *his counsel* never rejected or acknowledged that an arbitration agreement was signed by Guerriero, we agree with the District Court's conclusion that this statement does not refute or address ACE's declaration that *Guerriero* had refused to arbitrate. Last (and certainly not least), Guerriero in fact filed a complaint in state court raising his employment claims. In light of the earlier draft complaint, his attorney's statement about moving forward with filing that complaint, and the February 6 phone conversation, Guerriero's conduct in actually filing the complaint supports the conclusion that he had no intention of agreeing to arbitrate. There was, in short, nothing clearly erroneous in the District Court's conclusion that Guerriero refused to arbitrate.

Guerriero says that he did not refuse to arbitrate but rather was waiting to see a copy of the full arbitration agreement. He contends that he cannot be said to have refused to arbitrate when he had not seen the purported agreement. That alternative explanation does not, however, address the facts that the District Court relied on to conclude that he had refused to arbitrate. Besides, the record supports the conclusion that ACE had provided Guerriero with a copy of the signed agreement, and yet he continued to ask for "the full arbitration agreement[.]" (App. at 104.) On this record, Guerriero manifested either a refusal to arbitrate because he believed there was no arbitration agreement or a refusal to arbitrate because he believed what he signed was unenforceable. Under either scenario, he communicated to ACE that he had no intention of submitting to arbitration. Thus, we agree with the District Court's conclusion that ACE has Article III standing to

bring suit because it proved by a preponderance of the evidence that Guerriero had refused to arbitrate.

B. No Genuine Issues of Material Fact Preclude Compelling Arbitration.

Guerriero contends that there are genuine issues of material fact as to whether he had a valid, enforceable arbitration agreement with ACE because he never received the first two pages of ACE's Employment Dispute Arbitration Policy. ACE, of course, argues to the contrary.[6]

We exercise plenary review over a court's decision to compel arbitration. *Flintkote Co. v. Aviva PLC*, 769 F.3d 215, 219 (3d Cir. 2014). In assessing a motion to compel arbitration, we apply the familiar summary judgment standard, *Guidotti v. Legal Helpers Debt Resolution, L.L.C.*, 716 F.3d 764, 772, 774-76 (3d Cir. 2013), under which the motion to compel should be granted if "there is no genuine dispute as to any material fact[,]" Fed. R. Civ. P. 56(a). We construe the evidence in the light most favorable to the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

The FAA creates "a strong federal policy" of resolving parties' disputes through arbitration by enforcing the parties' arbitration agreements. *Puleo v. Chase Bank USA, N.A.*, 605 F.3d 172, 178 (3d Cir. 2010) (en banc) (citation omitted). Before compelling arbitration, however, courts must be satisfied that the parties have an agreement to arbitrate, because "arbitration is a matter of contract and a party cannot be required to

[6] Guerriero argues in the alternative that the one page he did sign is insufficient to compel arbitration over termination claims and statutory claims. Because we conclude that there are no genuine issues of material fact regarding his assent to the Employment Dispute Arbitration Policy, we do not address that alternative argument.

submit to arbitration any dispute which he has not agreed so to submit." *AT & T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 648 (1986) (citations omitted).

Our inquiry, therefore, consists of two questions: first, whether "there is an agreement to arbitrate" and, second, whether "the dispute at issue falls within the scope of that agreement." *Century Indem. Co. v. Certain Underwriters at Lloyd's, London, subscribing to Retrocessional Agreement Nos. 950548, 950549, & 950646*, 584 F.3d 513, 523 (3d Cir. 2009). When the parties have a valid arbitration agreement, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration[.]" *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) (citation omitted).

We apply general state law principles to determine whether the parties have agreed to arbitrate. *Aliments Krispy Kernels, Inc. v. Nichols Farms*, 851 F.3d 283, 289 (3d Cir. 2017). Here, the parties acknowledge that New Jersey law determines whether what was said and done amount to an agreement to arbitrate.

Under New Jersey contract principles, "[a]n enforceable agreement requires mutual assent, a meeting of the minds based on a common understanding of the contract terms." *Morgan v. Sanford Brown Inst.*, 137 A.3d 1168, 1180 (N.J. 2016). "[A]ny contractual waiver-of-rights provision must reflect that the party has agreed clearly and unambiguously to its terms." *Atalese v. U.S. Legal Servs. Grp., L.P.*, 99 A.3d 306, 313 (N.J. 2014) (internal quotation marks, brackets, and citation omitted). "When a party enters into a signed, written contract, that party is presumed to understand and assent to its terms, unless fraudulent conduct is suspected." *Stelluti v. Casapenn Enters., LLC*, 1

A.3d 678, 690 (N.J. 2010). "Failing to read a contract does not excuse performance unless fraud or misconduct by the other party prevented one from reading." *Gras v. Assocs. First Capital Corp.*, 786 A.2d 886, 894 (N.J. Super. Ct. App. Div. 2001) (citation omitted); *see also Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69, 84 (N.J. 1960) (describing same as a "general principle" of contract law).

Here, the District Court correctly concluded that Guerriero agreed to arbitrate any employment-related claims through ACE's Employment Dispute Arbitration Policy, that Guerriero's claims are within the scope of the agreement, and that the agreement is enforceable. Guerriero signed two documents that show he agreed to arbitrate his employment-related claims pursuant to the terms of ACE's Employment Dispute Arbitration Policy. First, in accepting his offer of employment with ACE, he signed and "agree[d] to employment under the terms of [the offer] letter[,]" which expressly referenced the Employment Dispute Arbitration Policy. (App. at 57.) Second, on his first day of employment, Guerriero signed an "Arbitration Agreement[,]" which provided that he "agree[s] ... [to] submit [any employment-related legal claims] to final and binding neutral third-party arbitration, in accordance with the ACE Employment Dispute Arbitration Policy recited above, which is made a part of this agreement." (App. at 59.) Although the two pages containing the Employment Dispute Arbitration Policy were missing from Guerriero's personnel file, it was ACE's usual business practice over many years to bring all new employees on board using the same steps, including providing a copy of the Employment Dispute Arbitration Policy. Furthermore, Guerriero had ready access to the Employment Dispute Arbitration Policy via ACE's intranet site.

Guerriero nevertheless contends that he could not have assented to the terms of the Employment Dispute Arbitration Policy because he never received them. But New Jersey law provides otherwise. Absent fraudulent activity, we presume a party understood and assented to the terms of a signed, written contract. *Stelluti*, 1 A.3d at 690. By the plain language of the documents he signed, Guerriero twice agreed to arbitrate any employment-related claims pursuant to the Employment Dispute Arbitration Policy. Absent a claim that ACE committed some fraud in inducing Guerriero to sign the documents he did, he cannot now escape the contract by arguing that he did not read or agree to the terms of the Employment Dispute Arbitration Policy. Thus, we agree with the District Court that Guerriero has not raised and cannot raise a genuine issue of material fact as to whether he agreed to the Employment Dispute Arbitration Policy.

Having decided that point, it is straightforward to next conclude that Guerriero agreed to arbitrate the type of employment dispute he now raises. Under the terms of the Employment Dispute Arbitration Policy, he specifically agreed to arbitrate claims regarding "whistle blowing," "termination of employment[,]" and "the New Jersey Conscientious Employee Protection Act[.]" (App. at 48-49.) Even if there were any ambiguity or question over the scope of the Employment Dispute Arbitration Policy, we would apply the presumption in favor of arbitration. *See Century Indem. Co.*, 584 F.3d at 555-56 (applying presumption in favor of arbitration after concluding the parties had entered into a valid and enforceable arbitration agreement). Because Guerriero agreed to the terms of the Employment Dispute Arbitration Policy, the District Court was correct to compel arbitration over the employment-related dispute that Guerriero now raises.

Guerriero is not without a forum to resolve his dispute with ACE. He is entitled to exactly the forum he contracted for – "final and binding neutral third-party arbitration, in accordance with the ACE Employment Dispute Arbitration Policy[.]" (App. at 59.)

III. CONCLUSION

For the foregoing reasons, we will affirm the District Court's order compelling arbitration, denying Guerriero's motion to dismiss, and enjoining Guerriero from pursuing his state court action.